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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922—No. 165.

BLAMBERG BROTHERS,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR THE APPELLANT.

Since the filing of appellant's principal brief in this case the Circuit Court of Appeals for the Second Circuit has filed an opinion in the case of *Cunard Steamship Company (Ltd.)* v. *United States.* The Government has printed a copy of the *Cunard* opinion as an appendix to its brief in the present case, and has stated that it is decisive of the questions here presented.

Also since the filing of appellant's brief in the present case the Government has filed in this Court its brief in the case of *Carver et al.* v. *United States*, which is similar in certain respects to the present case.

The *Cunard* and *Carver* cases are clearly distinguishable from the present case both on the facts and

the law, and we take the liberty of filing this reply brief for the purpose of bringing the distinction to the attention of this Court. We also desire to call attention to the inconsistent and conflicting positions taken by the Government in the various pending cases involving the construction of the suits in Admiralty Act; and to reply briefly to certain arguments made in the Government's brief in the present case which were not suggested in the Court below.

POINT I.

The *Cunard* decision and the *Carver* case are distinguishable from the present case because there the records did not disclose where the vessel was or even that she existed at the time or after suit was begun, or otherwise show that the libellants "could have maintained a proceeding in admiralty" anywhere.

Counsel for the United States cite in their brief the opinion delivered by the Circuit Court of Appeals for the Second Circuit, in the case of *Cunard Steamship Company* v. *United States* (Appellee's Brief, Appendix) on November 24, 1922, eleven days after our brief in this case was filed. It may be noted at the outset that the *Cunard* decision was rendered by the same Court which has certified to this Court the same question in the *Carver* case, which will be argued immediately after the case at bar. Apart from this point, however, the *Cunard* case is distinguishable from the present both on the facts and the law. Neither the record nor the opinion discloses where the United States owned vessel involved was at the time that suit was commenced. It does not even appear that the vessel there involved was

in existence at the time the action was begun. Nor is any other fact disclosed showing that the libellant at the time it commenced its action "could have maintained a proceeding in admiralty" anywhere. All discussion of other points was clearly *obiter dicta*. In that respect the *Cunard* case is identical with the *Carver* case. A further distinction from the *Carver* case is that in that case there was no election to proceed in accordance with the principles of libels *in rem*. Counsel for the United States apparently agree that the *Cunard* case is distinguishable from the present on the law, as they ignore in their argument here the reasoning of the Court in that case. The Court in the *Cunard* case assumed and, because of the exigency created by the theory it was developing, held that the Suits in Admiralty Act not merely created a remedy against the United States *in personam* as a substitute for a remedy under Section 9 of the Shipping Act of 1916 against the United States owned vessel *in rem*, but also created an independent liability or substantive right against the United States *in personam*, and in addition created an independent remedy to enforce that liability *in personam*. The Court then held, based on these assumptions, that Congress expressed in the act an intention that a libellant pursuing his substitute remedy *in personam* on the liability *in rem* should not have the privilege expressly granted all libellants in the second sentence of Section 2 of the Act of suing in any of the three districts specified. Counsel for the United States deny in their brief in this case the first fact or conclusion assumed by the Court in the *Cunard* case. On page 8 of their brief counsel say: "The scope of the jurisdiction provided by the Act has been seriously questioned. The legislative history indicates that it must be measured by and limited to the liabilities considered by Section 9 of the original Shipping

Act." Section 9 (quoted on p. 7 of Appellee's Brief and on p. 21 of Appellant's Brief) clearly shows an intention not to create a liability of the United States *in personam*. Counsel in thus interpreting the Suits in Admiralty Act follow Judge Thompson's declaration in *The Kittegaun*, 266 Fed. 897, 899 (E. D. Pa., July 1920), that:

> "The apparent purpose of Sections 1 and 2 of the Act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course of transportation, and to substitute for an action *in rem* against the vessel or cargo an action *in personam*."

POINT II.

The various interpretations placed upon the Suits in Admiralty Act by counsel for the Government are inconsistent with each other and are all contrary to the weight of judicial authority.

The Government's Interpretation in the Present Case.

In the present case counsel for the United States argue (Appellee's Brief, p. 8) that the Act recognizes no liability other than that created against the vessel by Section 9 of the Shipping Act of 1916; and contend that even such liability is recognized only so far as it is enforceable within the territorial limits of the United States. Under this interpretation the Suits in Admiralty Act merely substitutes a remedy *in personam* for such of the remedies *in rem* as are immediately enforceable in the selected district of this country at the particular moment the suit *in personam* is begun.

The Government's Interpretation in the Carver Case.

In the *Carver* case, in which the record does not disclose where the vessel was, or even that she was in existence, at the time when or after the action was commenced, or otherwise show that the libellant could have maintained a proceeding in admiralty anywhere, counsel for the United States deny that the Suits in Admiralty Act recognizes any liability created by Section 9 of the Shipping Act of 1916. They contend that Section 9 was repealed absolutely and that no substitute was created by the Suits in Admiralty Act excepting in cases where a private owner would be personally responsible.

The Interpretation by the Circuit Court of Appeals, Apparently at the Government's Suggestion, in the Cunard Case.

In the *Cunard* case (Appendix, Appellee's Brief) the Circuit Court of Appeals gives to the Suits in Admiralty Act a third and radically different interpretation. This interpretation is that the Suits in Admiralty Act not merely substitutes a remedy *in personam* for a remedy *in rem* founded on a liability of the vessel, but also creates a liability of the United States *in personam* and a remedy *in personam* on that liability. Reasoning from this assumption, the Court concludes that the second sentence of Section 2 of the Suits in Admiralty Act, relating to venue, does not mean what the language would naturally import, but means that a libellant suing on a liability of the vessel *in rem* may sue only in a district where the vessel is found. That this is a strained construction of the Act is evident on considering the fact that, if it had so intended, Congress could easily

have provided that a libellant pursuing a remedy *in personam* on a liability of the vessel *in rem* should have the right to sue only in the district where the vessel is found. Instead, it clearly formulated in the second sentence of Section 2, an alternative venue rule applicable to all libellants qualifying with a substantive right under the first sentence of that section.

It is significant that nowhere in their briefs in this or the *Carver* case (except by merely printing the opinion as an Appendix) do counsel for the United States adopt, or recognize as sound to any extent, the interpretation or reasoning of the Court in the *Cunard* case.

The Appellant's Interpretation of the Suits in Admiralty Act.

The interpretation of the Suits in Admiralty Act for which this appellant contends is clearly and concisely stated by Judge Foster in *Smith* v. *United States* (Appellant's Brief, Appendix A, p. 37):

> "The Act of March 9, 1920, contains no restriction in terms such as imposed by the decision in *Blamberg Bros.* v. *U. S., supra.* In fact, considering the provision of Section 7, Congress seems to take the position that a vessel owned by the United States Shipping Board cannot be seized *in rem* in any country."

All three of the interpretations placed on the Act by the Government, and by the Circuit Court of Appeals for the Second Circuit in the *Cunard* case, differ from the simple and natural interpretation given to the Act by Judge Foster in the *Smith* case. The decision of the Circuit Court of Appeals overruling the decision of Judge Learned Hand in the *Cunard* case is necessarily con-

trary to the decision of Circuit Judge Mack in the case of *Alsberg* v. *United States* (Appellant's Brief, Appendix B, p. 40), and to the decision of Judge Dickinson in *Phoenix Paint Co.* v. *United States* (Appellant's Brief, Appendix C, p. 43). It is also contrary to the decision of Judge Smith in *Middleton* v. *United States*, 273 Fed. Rep. 199, where there was an election to sue in accordance with the principles of libels *in rem*, and jurisdiction was sustained although the vessel was not within the district. The decision in the *Cunard* case is contrary also to the decision of Circuit Judge Mayer in the *Carver* case, and to the interpretation of the Act by Judge Thompson in the *Kittegaun* case hereinbefore quoted (*supra*, p. 4).

The decision in the *Cunard* case is in accord with the decision of Judge Learned Hand in the case of *Agros Corporation* v. *United States* (unreported, opinion annexed hereto as Appendix A), but both of these decisions are directly contrary to the Government's argument in the case at bar.

In view of the foregoing discussion of the District Court decisions in the various Circuits, we submit that the contention of the Government in the present case is unsupported by any authority excepting the decision of Judge Rose from which this appeal is taken; and that the decision of Judge Foster in the *Smith* case is based not only upon sound reasoning but is supported by the weight of actual decisions, as distinguished from mere dicta.

POINT III.

The words "in the United States or its possessions" in Section 1 of the Suits in Admiralty Act do not limit the jurisdiction of United States courts to afford the remedy provided by Section 2 of the Act.

The words "in the United States or its possessions" merely express a limitation in the first section of the Act which would necessarily be implied even in the absence of such words. A prohibition against the seizure of vessels of the United States obviously could have no extra territorial effect. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. The United States could properly endeavor to obtain immunity for United States-owned vessels in foreign countries, not through legislative fiat by Congress but only by diplomatic request or representation through the State Department. In other words, Section 1 of the Suits in Admiralty Act merely recognizes the inability of Congress to legislate or impose the sovereign will of the United States on foreign territory. This is confirmed by the language of Section 7 of the Act. Section 7 shows (as stated in *Smith* v. *United States*, Appellant's Brief, Appendix A), the intent of Congress that the vessels be immune, even though in foreign countries, and contains, as an effort to satisfy that desire, a conjunctive authorization or direction to the Secretary of State to "direct the United States Consul * * * to claim such vessel or cargo as immune from such arrest * * * *and* to execute an agreement, undertaking, bond or stipulation for and on behalf of the United States * * * for the release of such vessel."

It is a very significant circumstance that neither

the Circuit Court of Appeals in the *Cunard* case nor the Government in its briefs in this case or the *Carver* case, makes any reference to the provision in Section 7 of the Suits in Admiralty Act for contesting the jurisdiction of foreign courts; or makes any attempt to explain away the obvious intent of that section to prevent the seizure of United States vessels in foreign ports and concentrate the litigation against such vessels in the Courts of the United States.

POINT IV.

The appellant has clearly elected to have this case proceed upon the principles of libels *in rem*.

The Government has stated in its brief in the present case that there was no election by the libellant to have this case proceed upon the principles of libels *in rem*. We submit, however, that there is no substance in this contention in view of the facts stated in Point III of appellant's principal brief. Not only do counsel for the Government not dispute these facts but, on the contrary, after reciting the various steps taken in the litigation, including the filing of the Suggestion of Want of Jurisdiction and the Reply thereto, say in their brief (Appellee's Brief, p. 8):

> "The question of jurisdiction was then heard upon the suggestion of want of jurisdiction and the reply."

In this connection we quote as follows from the decision of this Court in the case of *The Syracuse*, 12 Wallace 167, at page 173:

> "It is objected that the libel does not specifically charge this antecedent negligence as a

fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the Court can see there was no design on his part in omitting to state them. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the Court to extract the real case from the whole record, and decide accordingly."

POINT V.

The construction of the act contended for by the appellant in this case will not subject the Government to any inconvenience or expose it to unlimited liability.

It is contended by counsel for the Government in this case and the *Carver* case that if jurisdiction is sustained the United States will be liable in excess of the value of the vessel and her pending freight. This argument is apparently based upon the mistaken assumption that, to obtain the benefit of the Limitation of Liability Act of 1851, the United States must surrender the vessel. This assumption is clearly erroneous, as the Admiralty Rules of this Court specifically provide that the owner of a vessel, in order to obtain a limitation of his liability, need only assign *his interest* in the vessel to a trustee; or pay into Court, or give security for, the appraised value of his interest in such vessel. Such proceedings need not be taken in the district where the vessel is, but may be taken "in the District Court for any district in which the said owner or owners may be sued in that behalf."

Upon giving the proper security or transferring his interest in the vessel to a trustee, the owner is entitled to an injunction restraining the beginning or prosecution of any other suits or proceedings against him. Supreme Court Admiralty Rules 51 and 54.

Counsel for the Government, in the *Carver* case, refer to the uncertainty as to the value or interest which must be surrendered, and emphasize the great decline in the value of vessels during the last year or two. These are considerations, however, which apply with equal force in all proceedings for limitation of liability, whether between private parties or in suits against the Government. If an owner, in order to obtain a limitation of his liability, must surrender the value of the vessel as of a date when she had a far greater value than at the time the surrender is made, this result, if deemed inequitable, must be corrected by amendment of the Limitation Act of 1851. We submit, however, that, for two reasons, there is no injustice in the present rule. In the first place the value of the vessel may just as well increase after the disaster, in which event the owner has the benefit of surrendering the lower value. In the second place, the owner actually receives, at the end of the voyage, the precise value which he is later called upon to surrender; and it is for him to determine whether he will retain this value in the form of a vessel or convert it into cash for the purpose of meeting liabilities which may later be asserted.

CONCLUSION.

It is respectfully submitted that, as the District Court had jurisdiction, its decree should be reversed with costs.

December 4, 1922.

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Appendix A.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 84-176.

THE AGROS CORPORATION

—against—

UNITED STATES OF AMERICA.

Sur respondent's exceptions to a libel in the admiralty.

The case raises only one question: Whether under the Act of March 9, 1920, a libellant may sue the United States *in personam* upon a maritime claim which would be cognizable by an admiralty court between private persons; or whether that Act is limited to suits *in rem*. The question arises upon exceptions to interrogatories annexed to the libel and designated to draw out the relation of the United States to the vessel, *i. e.*, whether there was a personal obligation of the United States from her failure to perform a contract of carriage.

HORACE S. GRAY for the exceptions.

RUSSEL T. MOUNT opposed.

LEARNED HAND, *D. J.*: I think that it is impossible to read the Suits in Admiralty Act (March 9, 1920) without concluding that Congress intended to provide for suits which are in the nature of *in personam* as well as *in rem*. In the first place, although the statute is drawn by persons entirely familiar with the usages and terms of the Admiralty Section 2, which confers the

right, speaks, not of a libel *in rem,* which as the natural phrase if the respondent be right, but of "a proceeding in admiralty." Whenever such a proceeding "could be maintained" if the "vessel were privately owned or operated," "a libel *in personam* may be brought." The statute appears, therefore, to speak *sub specie generals.* The history of the Act strongly corroborates this conclusion, as will appear in a moment.

Furthermore, even if Section 1, which enacts that the remedy *in personam* is to be a substitute for the right given by the Act of 1916 to arrest United States ships, raises a doubt upon this interpretation, the later sections lay it. Thus, in Section 3 the libellant may elect to proceed with his libel as *in rem*, if there be a lien, though of course without arrest. What can such an election be, if he have only that right? This is not even left to implication, because his election is not to deprive him "from seeking relief *in personam* in the same suit." "*In personam*" does not refer to the form of the libel, since that must be "*in personam*" anyway, all arrests being forbidden. It seems hardly necessary to argue that it refers to relief which could be given *in personam* against a private person, and thus necessarily presupposes that such relief is open to any libellant in a proper case.

Finally, Section 6 grants the same "exemptions" and "limitations of liability" to the United States as to private owners. Allowing that "exemptions" is an indefinite word, "limitations of liability" can scarcely mean anything but the limitation which has been given to ship owners for seventy years. It applies necessarily to rights *in personam,* and, since the Act is technically drafted, would have been quite meaningless unless suits *in personam* had been understood to be included.

The respondent's argument is plausible, based upon the main purpose of the Act, *i. e.,* to create a substi-

tute for the earlier right of arrest, and this is reinforced by the reports of the legislative committees. However, there appears to me a conclusive answer to any such argument in the history of the Act in Congress. The original draft of Section 2 read as follows: "The United States * * * may be sued *in personam* * * * in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained, or where, if a vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained and the vessel or cargo could be arrested or attached at the commencement of the suit."

Thus it appears that the final form of Section 2, *i. e.*, "a proceeding in admiralty," was a substitute for an express grant of jurisdiction as well over suits *in personam* as over suits *in rem*. Now it seems to me flatly impossible to suppose that when Congress made the change from the enumeration of these two kinds of suits to a general phrase fitted to include both, it intended to cover only one of the two enumerated. Having shown its prior purpose specifically to include both, and having finally selected less cumbersome language naturally including both, how can it be argued that it meant to cover only one which it had shown that it knew how to express accurately when it chose?

While the case is of first impression, so far as any judicial intimations have gone, they are in accord (*Middletown & Co.* v. *U. S.*, 273 Fed. R. 199, 200, 201; *Blamberg Bros.* v. *U. S.*, 272 Fed. R. 978, 979).

The exceptions to the interrogatories are overruled; the other exceptions were disposed of at the argument.

October 11, 1922.

LEARNED HAND,
D. J.